

## **BILL ANALYSIS**

Senate Research Center

S.B. 414  
By: Moncrief  
Health & Human Services  
6-30-97  
Enrolled

### **DIGEST**

Currently, under Texas Law, advance directives or out-of-hospital orders relating to the withholding or withdrawing of life-sustaining procedures in the event of a terminal condition are governed by three separate chapters within two different codes: Chapters 672 and 674, Health and Safety Code, and Chapter 135, Civil Practice and Remedies Code. The three chapters use similar terminology, have repetitive provisions, and deal with the issue of a directive or an order withholding or withdrawing life-sustaining procedures of an individual with a terminal condition. Inconsistencies between the three chapters causes confusion for individuals who want to develop advance directives or orders as well as providers who must carry out such directives or orders. This bill would consolidate and set forth uniform provisions governing the execution of these advance directives or orders.

### **PURPOSE**

As enrolled, S.B. 414 sets forth the conditions for execution of an advance directive in regard to the withholding or withdrawing life-sustaining procedures in the event of a terminal condition and redesignates the following relevant provisions under Chapter 166, Health and Safety Code: Chapter 672, Health and Safety Code, relating to the Natural Death Act; Chapter 676, Health and Safety Code, relating to out-of-hospital do-not-resuscitate orders; and Chapter 135, Civil Practice and Remedies Code, relating to the durable power-of-attorney for health care.

### **RULEMAKING AUTHORITY**

Rulemaking authority is granted to the Texas Department of Health in SECTIONS 2.02 and 2.06 (Sections 142.0145(c) and 248.0545(c), Health and Safety Code) and to the Texas Department of Human Services in SECTION 2.05 (Section 247.0455(c), Health and Safety Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1.02. Amends Title 2H, Health and Safety Code, by adding Chapter 166, as follows:

#### **CHAPTER 166. ADVANCE DIRECTIVES**

SECTION 1.02. Amends Title 2H, Health and Safety Code, by adding Chapter 166A, as follows:

#### **SUBCHAPTER A. GENERAL PROVISIONS**

Sec. 166.001. SHORT TITLE: ADVANCE DIRECTIVES ACT.

Sec. 166.002. DEFINITIONS. Defines "advance directive," "attending physician," "competent," "declarant," "durable power of attorney for health care," "incompetent," "life-sustaining procedure," "physician," "terminal condition," and "witness."

Sec. 166.003. WITNESSES. Sets forth who may not be a witness to the execution of an advance directive or the issuance of a nonwritten advance directive.

Sec. 166.004. STATEMENT RELATING TO ADVANCE DIRECTIVE. Sets forth the guidelines regarding written policies on the implementation of advance directives by a health

care provider.

SECTION 1.03. Amends Chapter 672, Health and Safety Code, by transferring it to Title 2H, Health and Safety Code, redesignated as Chapter 166B, Health and Safety Code, as follows:

#### SUBCHAPTER B. NATURAL DEATH

Sec. 166.031. DEFINITIONS. Redesignated from existing Section 672.002. Redefines "directive." Deletes definitions of "attending physician," "competent," "declarant," "incompetent," "life-sustaining procedure," "physician," and "terminal condition." Makes conforming changes.

Sec. 166.032. WRITTEN DIRECTIVE BY COMPETENT ADULT; NOTICE TO PHYSICIAN. Makes conforming changes.

Sec. 166.033. FORM OF WRITTEN DIRECTIVE. Makes conforming changes.

Sec. 166.034. ISSUANCE OF NONWRITTEN DIRECTIVE BY COMPETENT ADULT QUALIFIED PATIENT. Makes conforming changes.

Sec. 166.035. EXECUTION OF DIRECTIVE ON BEHALF OF PATIENT YOUNGER THAN 18 YEARS OF AGE. Makes a conforming change.

Sec. 166.036. NOTARIZED DOCUMENT NOT REQUIRED; REQUIREMENT OF SPECIFIC FORM PROHIBITED. Provides that a written directive executed under Section 166.033 or 166.035 does not need to be notarized. Prohibits a physician, health care facility, or health care professional from requiring that the directive be notarized or a person use a form provided by the physician, health care facility, or health care professional.

Sec. 166.037. PATIENT DESIRE SUPERSEDES DIRECTIVE. Makes a conforming change.

Sec. 166.038. PROCEDURE WHEN DECLARANT IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Makes conforming changes.

Sec. 166.039. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED A DIRECTIVE AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Authorizes an attending physician and the patient's legal guardian or an agent under a durable power of attorney for health care to make a treatment decision to withhold or withdraw life-sustaining procedures from the patient, if the patient has not executed or issued a directive and is comatose, incompetent, or otherwise mentally or physically incapable of communication. Authorizes an attending physician and one person, rather than two, from a specified category, to make a treatment decision if the patient does not have a legal guardian or an agent under a durable power of attorney for health care. Requires a treatment decision made under this section to be documented in the patient's medical record and signed by the attending physician. Requires a treatment decision made under this section to be witnessed by another physician who is not involved in the treatment of the patient if the patient does not have a legal guardian and a person listed in the specified category noted above. Makes conforming changes.

Sec. 166.040. PATIENT CERTIFICATION AND PREREQUISITES FOR COMPLYING WITH DIRECTIVE. Makes conforming changes.

Sec. 166.041. DURATION OF DIRECTIVE. Makes conforming changes.

Sec. 166.042. REVOCATION OF DIRECTIVE. Makes conforming changes.

Sec. 166.043. REEXECUTION OF DIRECTIVE. Makes conforming changes.

Sec. 166.044. EFFECT OF DIRECTIVE ON INSURANCE POLICY AND PREMIUMS. Makes conforming changes.

Sec. 166.045. LIMITATION OF LIABILITY FOR WITHHOLDING OR WITHDRAWING LIFE-SUSTAINING PROCEDURES. Provides that a physician or health facility that, in good faith, causes life-sustaining procedures to be withheld or withdrawn from a patient in accordance with this subchapter is not civilly liable for that action. Deletes the negligent exception to such prohibition of civil liability. Makes conforming changes.

Sec. 166.046. LIMITATION OF LIABILITY FOR FAILURE TO EFFECTUATE DIRECTIVE. Makes a conforming change.

Sec. 166.047. HONORING DIRECTIVE DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE. Makes conforming changes.

Sec. 166.048. CRIMINAL PENALTY; PROSECUTION. Makes a conforming change.

Sec. 166.049. PREGNANT PATIENTS. Makes conforming changes.

Sec. 166.050. MERCY KILLING NOT CONDONED. Makes conforming changes.

Sec. 166.051. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. Makes conforming changes.

SECTION 1.04. Amends Chapter 674, Health and Safety Code, by transferring it to Title 2H, Health and Safety Code, redesignated as Chapter 166C, Health and Safety Code, as follows:

SUBCHAPTER C. New heading: OUT-OF-HOSPITAL DO-NOT-RESUSCITATE ORDERS

Sec. 166.081. DEFINITIONS. Redesignated from existing Section 674.001. Deletes definitions of "attending physician," "board," "competent," "declarant," "department," "durable power of attorney for health care," "incompetent," "life-sustaining procedure," "physician," and "terminal condition." Redefines "DNR identification device" and "proxy." Makes conforming changes.

Sec. 166.082. OUT-OF-HOSPITAL DNR ORDER; DIRECTIVE TO PHYSICIANS. Deletes existing Subsection (c) regarding witness qualifications, and a reference to an executed or issued durable power of attorney for health care in accordance with Chapter 135, Civil Practice and Remedies Code. Makes conforming changes.

Sec. 166.083. FORM OF OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes.

Sec. 166.084. ISSUANCE OF OUT-OF-HOSPITAL DNR ORDER BY NONWRITTEN COMMUNICATION. Makes conforming changes.

Sec. 166.085. EXECUTION OF OUT-OF-HOSPITAL DNR ORDER ON BEHALF OF A MINOR. Makes a conforming change.

Sec. 166.086. DESIRE OF PERSON SUPERSEDES OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes.

Sec. 166.087. PROCEDURE WHEN DECLARANT IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Makes conforming changes.

Sec. 166.088. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED OUT-OF-HOSPITAL DNR ORDER AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Makes conforming changes.

Sec. 166.089. COMPLIANCE WITH OUT-OF-HOSPITAL DNR ORDER. Provides that

health care hospitals acting in out-of-hospital settings are not required to accept or interpret an out-of-hospital DNR order that does not meet the requirements of this subchapter, rather than chapter. Makes conforming changes.

Sec. 166.090. DNR IDENTIFICATION DEVICE. Makes conforming changes.

Sec. 166.091. DURATION OF OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes.

Sec. 166.092. REVOCATION OF OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes.

Sec. 166.093. REEXECUTION OF OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes.

Sec. 166.094. CONFLICT WITH NATURAL DEATH ACT OR DURABLE POWER OF ATTORNEY FOR HEALTH CARE. Makes conforming changes.

Sec. 166.095. EFFECT OF OUT-OF-HOSPITAL DNR ORDER ON INSURANCE POLICY AND PREMIUMS. Makes conforming changes.

Sec. 166.096. LIMITATION ON LIABILITY FOR WITHHOLDING CARDIOPULMONARY RESUSCITATION AND CERTAIN OTHER LIFE-SUSTAINING PROCEDURES. Makes conforming changes.

Sec. 166.097. LIMITATION ON LIABILITY FOR FAILURE TO EFFECTUATE OUT-OF-HOSPITAL DNR ORDER. Makes a conforming change.

Sec. 166.098. HONORING OUT-OF-HOSPITAL DNR ORDER DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE.. Makes conforming changes.

Sec. 166.099. CRIMINAL PENALTY; PROSECUTION. Makes conforming changes.

Sec. 166.100. PREGNANT PERSONS. Makes conforming changes.

Sec. 166.101. MERCY KILLING NOT CONDONED. Makes conforming changes.

Sec. 166.102. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. Makes conforming changes.

Sec. 166.103. DUTIES OF DEPARTMENT AND BOARD. Makes conforming changes.

Sec. 166.104. RECOGNITION OF OUT-OF-HOSPITAL DNR ORDER EXECUTED OR ISSUED IN OTHER STATE. Makes conforming changes.

SECTION 1.05. Amends Chapter 135, Civil Practice and Remedies Code, by transferring it to Title 2H, Health and Safety Code, redesignated as Chapter 166D, Health and Safety Code, as follows:

#### SUBCHAPTER D. DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Sec. 166.151. DEFINITIONS. Redesignated from existing Section 135.001. Deletes definitions of "attending physician," "capacity to make health care decisions," "durable power of attorney for health care," "health care decision," and "physician." Makes conforming changes.

Sec. 166.152. SCOPE AND DURATION OF AUTHORITY. Makes conforming changes.

Sec. 166.153. PERSONS WHO MAY NOT EXERCISE AUTHORITY OF AGENT. Makes a conforming change.

Sec. 166.154. EXECUTION AND WITNESSES. Requires the durable power of attorney for health care to be signed by the principal in the presence of at least two, instead of two or more, subscribing witnesses. Requires a witness to possess the qualifications and be subject to the restrictions provided by Section 166.003. Deletes text requiring the witnesses to affirm that, at the time the durable power of attorney for health care was signed, the principal appeared to be of sound mind to make a health care decision. Makes conforming changes.

Sec. 166.155. REVOCATION. Makes conforming changes.

Sec. 166.156. APPOINTMENT OF GUARDIAN. Makes a conforming change.

Sec. 166.157. DISCLOSURE OF MEDICAL INFORMATION. Makes a conforming change.

Sec. 166.158. DUTY OF HEALTH OR RESIDENTIAL CARE PROVIDER. Makes conforming changes.

Sec. 166.159. DISCRIMINATION RELATING TO EXECUTION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE. Makes a conforming change.

Sec. 166.160. LIMITATION ON LIABILITY. Makes conforming changes.

Sec. 166.161. LIABILITY FOR HEALTH CARE COSTS. Makes a conforming change.

Sec. 166.162. NATURAL DEATH ACT. Makes conforming changes.

Sec. 166.163. ENFORCEABILITY OF DURABLE POWER OF ATTORNEY EXECUTED IN ANOTHER JURISDICTION. Makes conforming changes.

Sec. 166.164. DISCLOSURE STATEMENT. Makes a conforming change.

Sec. 166.165. FORM OF DISCLOSURE STATEMENT. Makes conforming changes.

Sec. 166.166. FORM OF DURABLE POWER OF ATTORNEY. Sets forth the language required in the statement of witnesses. Deletes certain declarations in the statement. Makes conforming and nonsubstantive changes.

Sec. 166.167. CIVIL ACTION. Makes conforming changes.

Sec. 166.168. OTHER RIGHTS OR RESPONSIBILITIES NOT AFFECTED. Makes conforming changes.

SECTION 2.01. Amends Section 313.003(a), Health and Safety Code, to make conforming and standard recodification changes.

SECTION 2.02. Amends Chapter 142A, Health and Safety Code, by adding Section 142.0145, as follows:

Sec. 142.0145. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires the Texas Department of Health (TDH) to assess an administrative penalty against a home and community support services agency that violates Section 166.004. Requires the penalty assessed under this section to be \$500. Requires the penalty to be assessed in accordance with TDH rules. Requires the rules to provide for notice and an opportunity for a hearing.

SECTION 2.03. Amends Subsections (a) and (c), Section 241.059, Health and Safety Code, to require the commissioner of health (commissioner) to assess an administrative penalty against a hospital that violates Section 166.004. Requires the penalty for a violation of Section 166.004 to be

\$500. Authorizes each day of a continuing violation, other than a violation of Section 166.004, to be considered a separate violation.

SECTION 2.04. Amends Chapter 242C, Health and Safety Code, by adding Section 242.071, as follows:

Sec. 242.071. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires the commissioner to assess an administrative penalty under this subchapter against an institution that violates Section 166.004. Requires a penalty assessed in accordance with this section to be \$500 and prohibits a separate penalty from being assessed for a separate day of continuing violation.

SECTION 2.05. Amends Chapter 247C, Health and Safety Code, by adding Section 247.0455, as follows:

Sec. 247.0455. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires the Texas Department of Human Services (DHS) to assess an administrative penalty against a personal care facility that violates Section 166.004. Requires a penalty assessed under this section to be \$500. Requires the penalty to be assessed in accordance with DHS rules. Requires the rules to provide for notice and an opportunity for a hearing.

SECTION 2.06. Amends Chapter 248C, Health and Safety Code, by adding Section 248.0545, as follows:

Sec. 248.0545. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires TDH to assess an administrative penalty against a special care facility that violates Section 166.004. Requires a penalty assessed under this section to be \$500. Requires the penalty to be assessed in accordance with TDH rules. Requires the rules to provide for notice and an opportunity for a hearing.

SECTION 3.01. Effective date: January 1, 1998.

SECTION 3.02. Makes application of this Act prospective.

SECTION 3.03. Makes application of this Act prospective.

SECTION 3.04. Emergency clause.